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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM R. LUX,
Petitioner,

v.

FRANK ANGEL,
Respondent.

RESPONDENT'S BRIEF-IN-OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

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TABLE OF CONTENTS

PAGE

Table of Contents..... i

Table of Authorities..... ii

Respondent's Statement of the Case..... 3

Reasons for Refusal of the Writ..... 12

1. This case does not present the correct factual context for proper resolution of the questions Petitioner seeks to be reviewed.
..... 12

2. There is no conflict among the lower courts concerning the applicability of Pickering v. Board of Education, which requires resolution by this Court.
..... 14

3. The New Mexico Court of Appeals opinion is correct and should be left undisturbed.
..... 19

4. This case is inappropriate for review because there are adequate non-constitutional bases for decision.
..... 23

Conclusion..... 25

TABLE OF AUTHORITIES

PAGE

Arnett v. Kennedy,
416 U.S. 134 (1974).....17

Cantwell v. Connecticut,
310 U.S. 296 (1940).....22,23

Chaplinsky v. N.H.,
315 U.S. 568 (1942).....21

Clark v. Holmes,
474 F.2d 928 (1972).....19,20

Downing v. Williams,
629 F.2d 612 (1980).....18

Feiner v. New York,
340 U.S. 315 (1951).....22

Light v. United States,
220 U.S. 523 (1911).....24

Lux v. Board of Regents of New Mexico Highlands University,
NM , 622 P.2d 266
(N.M. App. 1980).....5

Mount Healthy City School District Board of Education v. Doyle,
429 U.S. 274 (1977).....25

Muskrat v. United States,
219 U.S. 346 (1911).....24

Old Dominion Branch #496 v. Austin,
418 U.S. 264 (1974).....25

Pickering v. Board of Education,
391 U.S. 563 (1968).....passim

Porter v. Califano,
592 F.2d 770 (1979).....18

PAGE

Rescue Army v. Municipal Court of City of Los Angeles, 331 U.S. 541 (1947).....23,24

Siler v. Louisville and Nashville RR Co., 213 U.S. 175 (1909).....24

State v. Chaplinsky, 91 N.H. 310, 313, 18 A.2d 754, 758 (1941).....22

Stewart v. Bailey, 556 F.2d 281 (5th Cir. 1977).....18

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).....14,15,16,17

Van Ooteghem v. Gray, 628 F.2d 488 (1980).....17

OTHER AUTHORITIES

U.S.Const. Art. III.....23

III

Respondent's Statement of the Case

Respondent deems Petitioner's statement of the case to be misleading and woefully inadequate for the Court's purposes in evaluating the Petition for Writ of Certiorari. The following facts, found in the Transcript of Proceedings of the trial in this action are necessary for the Court to make an informed decision.

The Federal Title III Program was a multi-faceted effort aimed at bringing small institutions with heavy minority enrollment into the mainstream of culturally sensitive higher education in the United States. Development and implementation of Title III Programs were expected to have a profound influence on the character of institutions in curriculum, faculty staffing and educational philosophy. As such, the Title III Washington Office charged with dispensing funds looked for institutions with strong leadership potential from their presidents in order to assure that the institution would have clear guidance through foreseeably difficult transitional periods.

At New Mexico Highlands University, the Title III Program was structured to include a whole new series of academic courses in virtually all of the established departments of the university. The basic institutional problem faced by the university involved the enormous difficulties inherent in attempting to integrate the new program with the established academic curriculum and administrative scheme. There were serious questions concerning the limits of authority and

responsibility of the Director of Title III with regard to the creation and control of curriculum, staffing and budgeting for the institution. The entire process created considerable upheaval, controversy and concern within the Highlands University community.

The problem was exacerbated by the size of the Title III Program and grant at Highlands University. The Title III budget for the 72-73 school year was Six Hundred and Seventy-Five Thousand Dollars ($675,000.00). The state allocation budget was approximately Two Million Seven Hundred Fifty Thousand Dollars ($2,750,000.) Clearly, a new money injection of this magnitude into a small institution carried the potential or significant dislocation in the pursuit of institutional goals.

The Petitioner Lux was named as the Director of the Title III Program at Highlands University in June of 1972. He held the post until August 31, 1975. Because of the size of the grant, the Washington Title III Office required a full-time director, and Lux functioned primarily, if not exclusively, as an administrator throughout the time that he held the post. For the academic years 72-73 and 73-74, his salary was paid largely out of Title III funds budgeted for administrative support of the program.

Because of the academic orientation of Title III, the director of Title III was vested with the title and position of Assistant Academic Dean. The move was made to give the Title III Program high visibility within the schools administrative and academic structure. Lux held the title and position of Assistant Academic Dean and Director of Title III from June,

1972 until August, 1974, under successive one year contracts running from September 1, to August 31, of each year.

Lux was unable to get along with or function well with the Academic Dean and in the Spring of 1974, President Frank Angel, the Respondent, determined to move Lux in order to alleviate the problem with McGahan and also in order to keep a closer acquaintance with Lux and the Title III Program. In order to maintain the programs high visibility, he named Lux Assistant to the President for Planning and Development and Director of Title III. Lux held this post, which he viewed as a promotion, until August, 1975, under a contract with a term running from September 1, 1974 to August 31, 1975.

Petitioner Lux, thus, held high administrative posts within Highlands University. In his position as Director of Title III, the Petitioner was in daily contact with other high administrative personnel, including the Academic Dean and President Angel, the number two and number one positions in the administrative structure. The contact was so constant, in fact, that Respondent Angel came to feel it burdensome and intrusive, taking from his time and other duties as president of the university.

Lux obviously had a close and confidential administrative relationship, with Respondent Angel. The relationship was made even closer when Lux was made Assistant to the President for Planning and Development.

As the first spanish surnamed president of any four year institutions of higher

learning in the United States, the Respondent Angel was keenly interested in the success of the Title III program at Highlands University. Angel felt it necessary to take a more active role in the Title III Program because of his feeling that the budget of the program did not emphasize the Ethnic Studies component sufficiently, and because he felt that Lux needed help in administering the program.

Angel adjusted the budget to increase the amount of money to be spent in the ethnic studies area. The adjustments did cause Angel to experience some delay in getting Washington approval for the changes, even though the changes were under 10% for the budget year, a percentage normally viewed as too inconsequential to require Washington approval.

Throughout this time, the Petitioner Lux made no constructive attempts to work around the slight problem caused by Washington's delay in granting official approval to the revised budget, even though there were administratively proper--almost routine--methods of dealing with such problems available to him as Director of Title III.

Lux had experienced some difficulty in dealing with the faculty and department chairman in implementing the Title III academic program in conjunction with the standard curriculum. Angel attributed the problem to administrative immaturity on the part of Lux and in order to help the situation decided to add further support to the program through his participation.

Angel's intervention had little or no effect on Lux' style or efforts in

directing the program. Student dissatisfaction did rise and the presidents office was occupied by certain students on September 25, 1973. A meeting of the Board of Regents of the university was held on October 15, 1973. The Respondent Angel requested Lux, as Director of Title III and Assistant Academic Dean, to appear at the meeting and give a report on the program. In response to Angel's request to speak in his official capacity, Lux appeared and issued the statement quoted by the New Mexico Court of Appeals in its opinion. Lux v. Board of Regents of New Mexico Highlands University, N.M. , 622 P.2d 266 (NM App. 1980).

The remarks were clearly a direct attack on the administration of which Lux was a part. Just as clearly the remarks were aimed at Respondent Angel personally. Angel was initially surprised (that a high ranking administrator, the Director of Title III, would deliver such remarks in his official capacity). His surprise naturally turned to anger. In an attempt to identify and mollify the source of emotion that prompted Petitioner Lux to speak as he did, Angel took even more time to attend to the Title III program and Petitioner Lux.

In the Spring of 1974, Angel was the subject of a vote of no confidence issued by the New Mexico Highlands University faculty. The major problem leading to the vote was the continued festering of the Title III boil on the neck of the faculty body. Petitioner Lux had failed throughout his tenure as Director of Title III to successfully integrate the Title III Program into the University structure. Transcripts of the faculty meetings introduced

to the trial clearly indicate serious misgivings on the part of the faculty as to the role of Title III in the university curriculum and also clearly indicate mistrust of and apprehension over the Director of Title III as an office and a person. The Respondent Angel defended Lux and Title III vigorously.

Angel at this time determined that more faculty involvement in all phases of the Title III Program was necessary and desirable. Angel created a Title III Committee which was to aid in all phases of administration of the Title III Program. Petitioner Lux was appointed chairman of the committee. Certain members of the faculty comprised the remainder of the membership. The Title III Committeee came into active existence in early February, 1975. Lux, however, disagreed with Angel with regard to the necessity or advisability of establishing any faculty committee with the power or function of overseeing Title III administration. Lux' disagreement was strong enough that he in fact refused to attend the committee's meetings or participate in anyway in its proceedings, though he was the putative chairman of the committee and even though he was given every chance to actively participate.

Title III and the Petitioner Lux came under increasing scrutiny and outright attack from essentially all quarters of the campus community outside Respondent's office:

1. Students and employees of the ethnic studies component of the Title III Program requested that an audit be conducted of Lux' handling of Title III monies. The audit was carried out by an ad hoc

committee of students, faculty of persons from the university business office.

2. Angel had to intervene in favor of ethnic studies coordinators who complained that Lux refused or failed to give them accurate budget information concerning their own programs.

3. The faculty policy committee--Highland Universities equivalent of a faculty senate--conducted its own investigation of the status of Title III within the university. Its determination was that the Title III Program suffered from too little faculty input at all levels. The policy committee also determined that Petitioner Lux' directorship of Title III had been inappropriate and ineffectual in that the best interest of the Program and the University would be served by removing Lux as the director. The policy committee conveyed its findings to Angel in the Spring of 1975.

Petitioner Lux' problems as director came to a head when Angel discovered that Lux had sent to Washington a totally unauthorized document purporting to evaluate the Title III Program at Highlands University for the Washington office. Periodic evaluations were required by Washington of all Title III Programs, in order to determine the effectiveness of the programs funded. Angel determined to have the evaluation done by independent and external evaluators. Lux did not submit his document to the external evaluators for inclusion in their evaluation form. Rather, he sent a document directly to Washington. When received, the Washington office thought it was the university's official evaluation and it was surprised to receive

another evaluation some days later. Lux' document was negative and injurious to the Title III Program at Highlands University. Upon discovering Lux' action, Angel forbade him to send any further communications in his capacity as Director of Title III without Angel's prior approval.

In the face of this mounting pressure, Petitioner Lux retreated further and further from active participation in the Title III Program. From mid June, 1975 to the end of his contract period on August 31, 1975, Lux participated little, if at all, in his position as Director of Title III and Assistant to the President for Planning and Development. His retreat was so complete that he failed to prepare a budget proposal for the following school year for the Title III Program. The Title III Committee had to reconstruct a budget from source materials on an emergency basis in order to meet a submission deadline.

On July 31, 1975, Angel informed Lux he would not offer Lux another contract as Director of Title III and Assistant to the President for Planning and Development. Lux received his normal contract as a tenured member of the Highlands University faculty, where he teaches today.

In addition to the above, the testimony adduced at the trial of this matter, found in some 2,000 pages of prepared record, was as follows:

Dr. Leonard Salazar, an experienced and knowledgeable person in the field of higher education, and particularly in the evaluation of programs funded by the federal government at institutions of

higher education (X Tr. 484-96) testified that:

1. He came to Highlands University to evaluate its program in an independent and arms length manner. (X Tr. 516-17);

2. During his interviews he discovered that relationships between the heads of the subcomponents of the Title III program and its Director, Plaintiff Lux, were quite strained. (X TR. 512-13);

3. He found difficulties with the administration of the Title III program overall. (X Tr. 516-27, 540, 546-47);

4. He found and decided that Plaintiff Lux was not dealing well with the problems inherent in the Title III program on the Highlands campus. (X Tr. 518-27, 540, 546-47);

5. He recommended at a private exit interview with Defendant Angel that Plaintiff Lux not be continued in the position of Director of Title III. (X Tr. 499-500, 538-40, 546-47; Plaintiff's Exhibit 25);

Dr. Harold Zennick, the Acting Director of the Title III program for the 1975-76 and 1976-77 school years, testified that during the spring and summer of 1975, in his working with the Title III committee, he observed that:

1. Under Lux there was a total lack of budgetary control and management of the Title III program, with no information being supplied on a regular basis to the subcomponents of the Title III program. (X Tr. 687, 704-12);

2. That there was a total breakdown of communication between the Director, Plaintiff Lux, and the heads of the various subcomponents of the Title III program. (X Tr. 704-06);

3. Dr. Zennick, along with the rest of the Title III committee, recommended that Dr. Lux not be reappointed to the position of Director of Title III (X Tr. 714-15).

Dr. John Pacheco, who served as the head of the Ethnic Studies subcomponent of the Title III grant for a time in the 1974 school year, testified that he had severe problems with Lux and his style of administering the Title III program, including Lux' direct interference with Dr. Pacheco's work as a program director with regard to the development of courses and materials, and also Lux' unprofessional method of allowing personalities and personal grudges against various department heads to interfere with Dr. Pacheco's work and coordination with such departments. (X Tr. 606-08, 612, 737-38).

Dr. Merritt McGahan, testified:

1. That he was concerned and alarmed at Plaintiff Lux' style of administration in that it tended to place too much emphasis on edict and direction when the academic and political situation on the Highlands campus dictated a different approach to persuasion. (X Tr. 954-70, 986-87);

2. That Plaintiff Lux consistently disregarded normal channels of communication within the University, in particular bypassing department chairmen with regard to questions and decisions which required their input.(X Tr. 1015-17, 1029).

Dr. Sigfredo Maestas, the Academic Dean during the school year 1974-1975, testified that during a meeting of the Ethnic Studies coordinators, Lux, Angel and himself, he observed Lux directly refuse to obey an order given him by Defendant Angel concerning the provision of budgetary information to the Ethnic Studies subcomponents and with regard to the expedition of travel and expense reports (X Tr. 1159-67).

Maria Padilla, secretary to Petitioner Lux throughout the period of his Directorship of the Title III program at Highlands University, testified that:

1. During the spring and summer of 1975, Lux essentially absented himself from the New Mexico Highlands University Campus and his office (X Tr. 751-52);

2. That she had not seen or typed Defendants' Exhibit 6, the Director's Statement of Evaluation of Title III (X Tr. 748-49).

Defendant Angel himself testified that he decided in the latter days of July 1975 not to renew Petitioner Lux as Assistant to the President and Director of Title III, because;

1. Lux had on several occasions failed to follow orders from Defendant Angel issued in Defendant Angel's capacity as Chief Executive Officer of Highlands University;

2. Lux' refused to work with the Title III Committee;

3. Lux failed to provide the type of leadership needed to properly integrate

the Title III program into the mainstream of the University structure;

4. The Title III grant for the 1975-1976 school year had been cut further, and there would not be enough money to pay a full time director of the program out of the Title III funds;

5. A new president was coming to take over at New Mexico Highlands University on September 1, 1975, and Defendant Angel did not wish to impose on the new president any personnel, but rather wanted to give the new president the opportunity to exercise his right to pick his own assistants;

6. Defendant Angel took into account the recommendations from the external evaluators, Dr. Leonard Salazar, and the Policy Committee, not to continue Lux in the Title III position. (X Tr. 1607-13).

REASONS FOR REFUSAL OF THE WRIT

1. This case does not present the correct factual context for proper resolution of the questions Petitioner seeks to be reviewed.

The Petition seeks another statement by the Supreme Court on college faculty members First Amendment Rights. Assuming for the sake of argument only that such a review is necessary, this case is certainly not the proper vehicle for the analysis.

Petitioner ignores one crucial fact: Throughout the course of the events giving rise to this action, Petitioner Lux was employed, and was acting purely in his

capacity as, a highly placed administrator of Highlands University. The remarks which he delivered to the Board of Regents were not delivered as an interested citizen, or even as a faculty member, but as the Assistant Academic Dean and the Director in charge of administering the very program he was to comment on. Petitioner Lux was requested by Angel to speak at the October, 1973 Board of Regents meeting in an official capacity, as a spokesman for the university, the administration and the man he attacked.

It is not an overstatement to say that Petitioner's status as a faculty member of Highlands University was not only never questioned or affected by this case, but that it was irrelevant to the resolution of the issues in the case. For example, Petitioner Lux' non-renewal was only in his administrative positions as Assistant to the President for Planning and Development and Director of Title III. Petitioner even today retains his faculty position at Highlands University. The party's statements of the factual context contain no indication that Petitioner's status as a faculty member was considered by the parties or the lower court. All of the evidence dealt with his performance as a highly placed administrator.

It is not difficult to perceive that there is a significant difference between administrators as highly placed as Petitioner was and a faculty member qua faculty member. Petitioner was in a position which not only placed him in a close proximity and gave him ready access to the very nerve center of the university's governance, but also vested him with considerable discretionary and policy making powers in his

own right. In such a position, when Petitioner spoke, he spoke in a basic sense for the university. A faculty member is rarely in a position of such delicacy. Faculty members normally speak to or about the institution rather than for it. An institution's need to exercise considerable discretion over person's speaking for it is obviously different from the interests requiring protection when a faculty member speaks.

The considerations and policies which would control a First Amendment claim by an administrator such as Petitioner are of a different order from the considerations already dealt with at length in the Court's prior decisions on faculty First Amendment rights. It could well be that administrators such as Petitioner are governed by rules and considerations which are not even on a continuum with standards properly applicable to faculty members as such.

The Court should not grant a Writ in this case because it would necessarily be faced with questions and issues not urged by the Petitioner while attempting to resolve issues not found in the factual context of the case.

2. There is no conflict among the lower courts concerning the applicability of Pickering v. Board of Education, which requires resolution by this Court.

The Petitioner makes much of a purported conflict among the lower courts as to the proper application of the Pickering balancing test. This alleged conflict is supposedly caused by this Court's decision in Tinker v. Des Moines Independent

Community School District, 393 U.S. 503 (1969). A more discriminating examination of the cases reveals that there is no conflict at all, either between the lower court cases or between Pickering and Tinker.

Tinker, of course, involved the exercise of First Amendment Rights by high school students. There, certain students arrived at their high school wearing black arm bands. They were ordered to remove them under pain of disciplinary action. There was no showing of any adverse effect on school routine because of the students' activities. This Court held that in such circumstances, students' exercise of their First Amendment rights could not be curtailed unless substantial disruption or material interference with school activities could reasonably be expected to result from the activity.

Respondent does not argue with the holding of Tinker. However, Respondent does assert that there are significant differences between the status of students as opposed to government employees, including teachers. The differences are clearly even more marked when one considers highly placed administrators. It is much easier to frame and state a broad rule of conduct in student situations because the relationship of the student to teachers and administration does not vary significantly.

Pickering involved a high school teacher who wrote a letter to the editor critizing the school board's allocation of money between athletic and academic programs. The school board there made allegations similar to those found in Tinker that

Pickering's action would tend to foment controversy, conflicts and dissension among teachers, administrators and the board of education and the residents of the districts, and would also be disruptive of faculty discipline. The Court swept aside the board's undocumented fears and held that the teacher in that case should be treated as if he were a member of the general public.

It is true that Pickering did not take the further step that Tinker did in stating a requirement of material interference with school activities (though it is difficult to imagine that the court would allow minimal or immaterial interferences to allow curtailment of First Amendment Rights in such a situation). This "failure," however, is but an illustration of the genius of Pickering. The court in Pickering was acutely aware of the "enormous variety of facts and situations" which could be encountered in this area of human action. 391 U.S. at 569 It consciously, and wisely, determined not to lay down any general standards against which all teacher or other government employee statements could be measured. It is not difficult to imagine entirely plausible scenarios where teacher First Amendment activities could serve as proper grounds of dismissal, even in the absence of evidence of material disruption of school activities. Because of the teacher's position in the educational process and because of their responsibility to the students themselves, some First Amendment activities could be grounds for dismissal without causing a disturbance in terms of inciting violence or otherwise materially disturbing the normal working of the system.

The impropriety of setting standards in this area, in the sense that Petitioner is inviting the courts to do, has not lessened with the passage of time. In Arnett v. Kennedy, 416 U.S. 134 (1974), this court reaffirmed the balancing test of Pickering with laudatory language and also again recognized the futility and lack of wisdom of attempting to be too specific in laying strict rules and categories of protected and unprotected First Amendment activities. Pickering and Tinker are thus not at odds; they merely deal with distinct situations.

Neither are the lower court cases at odds. Certainly Petitioner fails to demonstrate the conflict he so baldly asserts. Petitioner describes not a single example of similar cases dealt with differently by the circuits cited. And, Respondent's reading of all of the cases cited in the Petition reveals no conflict whatsoever between them. Respondent perceives all of the cases cited by Petitioner to be merely appropriate applications of the Pickering balancing technique of decision making. Certain of the cases exhibit the influence of Tinker, but the influence exhibits itself only as an element of pure Pickering balancing. There is no example of similar cases dealing with the Tinker case differently. In fact, all of the cases cited by Petitioner cite Pickering approvingly and utilize the Pickering calculus, rather adroitly emphasizing such of the suggested elements as are appropriate to the particular fact situation.

For example, in Van Ooteghem v. Gray, 628 F.2d 488 (1980), the Fifth Circuit dealt with a county employee who was fired

because of a speech he planned to give on the civil rights of homosexuals. The speech was entirely unconnected with his employment. In such a case, the court applied Pickering and obviously found no governmental interest whatever in curtailing the speech. See also Downing v. Williams, 629 F.2d 612 (1980).

Petitioner's amazement at the observation that a single circuit can state more than one "standard" in its cases merely reveals that the Petitioner has failed to appreciate the excellent mechanics of Pickering.

Finally, Petitioner's citation and quotation of Stewart v. Bailey, 556 F.2d 281 (5th Cir. 1977) is unavailing to him. First, it is a 1977 case from the 5th Circuit, a circuit which Petitioner obviously feels has corrected its unprincipled ways in later cases such as Porter v. Califano, 592 F.2d 770 (1979). More importantly, it is clear that the quote from Stewart v. Bailey, given in the petition is merely a less eloquent restatement of Judge Goldberg when he wrote in Porter:

> . . . Pickering states that the First Amendment requires the government not just to show that certain employees speech injures the government, but to show that the benefits of preventing the injury actually outweigh the profound benefits of free speech in our society. 592 F.2d at 779.

This Court should not be lulled into accepting a task which it has twice before faced and rejected as impractical, if not impossible of resolution.

3. The New Mexico Court of Appeals opinion is correct and should be left undisturbed.

Stripped of the perhaps too artful language employed by the author of the opinion below, the operative holding of the New Mexico Court of Appeals is that the Petioner Lux speech was not protected in the particular circumstances of the case.

It is clear that the Court was fully aware of the facts in the case. In particular, it is clear that the Court fully appreciated that this case dealt with the acts and speech of a highly placed administrator qua administrator, and not a faculty member. For example, the court noted in its discussion of the equal protection claim that Lux was terminated only in his administrative post and not his faculty position. That distinction was crucial in its decision of the equal protection theory. Also, the court detailed the different titles Petitioner held throughout his time as Director of Title III. Finally, the court also printed Petitioner's contracts and noted that certain provisions thereof dealt only with his faculty position.

Thus, the Court of Appeals was cognizant that Respondent Angel requested Lux to report to the Regents about Title III at their October, 1973 meeting as the Director of Title III and Assistant Academic Dean. The court was not evaluating Petitioner's remarks as if made by a faculty member, but as made by a member of the higher administrative echelon of the university in his official capacity.

At this point, reference to the case of Clark v. Holmes, 474 F.2d 928 (1972) is instructive in diciphering the Court of Appeals thinking. The court below cited Clark in support of its decision on the speech claim. Clark involved a faculty member dismissed from his faculty position, primarily because of disagreements with the administration concerning curriculum and because of his activities in belittling other staff members to students. The court in Clark held that in light of the circumstances at hand, neither incident of First Amendment activity involved a matter of public concern and thus were not protected.

The Court of Appeals obviously felt that the disagreements Lux and Angel were having concerning Title III in the fall of 1973 were the equivalent of arguments concerning curriculum. Thus, as between high level administrators, the disagreements over the budget were matters of private concern and not a matter for public airing. In addition, the Court of Appeals clearly decided that the tone of the remarks were particularly inappropriate as between high level administrators. In light of the circumstances of the case, involving men in policy making roles and confidential administrative relationships, the Court obviously held that it was improper to publicly air differences of opinions in any manner, but it was particularly egregious and offensive in the intemperate and defamatory manner chosen by the Petitioner Lux. The Court of Appeals opinion cannot be held to be clearly erroneous under the circumstances of the case.

Respondent submits that the opinion below is well within the ambit of

Pickering, albeit perhaps not clearly articulated as such.

In addition, in the circumstances of this case, the Petitioner Lux remarks could be held to be unprotected on a theory analogous to the Supreme Courts "fighting words" doctrine. The "fighting words" doctrine is based on the idea that certain words come within the ambit of action rather than speech. There is no intellectual content to be conveyed to the listener but merely a provocative, emotional message intended and likely to incite an immediate response. Thus, in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) the court held:

> there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include . . . the insulting or 'fighting words' -- those which by their very utterance inflict injury or tend to incite a immediate breach of the peace. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that might be derived from them is clearly outweighed by the social interest in order and morality. 315 U.S. at 572-574.

In Chaplinsky, this court upheld a breach of peace conviction where the speaker described the city marshall to his face, as a "god damned racketeer and a damn facist." The New Hampshire breach of peace statute had been carefully drawn and

narrowly construed by the Supreme Court to do no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee. See State v. Chaplinsky, 91 N.H. 310 18 A.2d 754 (1941).

In addition, the Chaplinsky court adopted the test for "fighting words" as articulated by the Supreme Court of New Hampshire;

> The test is what men of common intelligence would understand would be words likely to cause an adverse addressee to fight. . . the english language has a number of words and expressions which by general consent are fighting words when said without a disarming smile. 91 N.H. at 320-321.

A variation of the "fighting words" doctrine was applied in Feiner v. New York, 340 U.S. 315 (1951). In Feiner, the speaker addressed a hostile audience of approximately 75 to 80 black and white people. The address included offensive descriptions of the city mayor and President Truman, and called on blacks to "rise up in arms and fight for equal rights." 340 U.S. at 330. After one person In the audience threatened violence, the police arrested Feiner and he was convicted under the state disorderly conduct statute.

Upholding the conviction the Court held:

> the offense known as breach of peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. 340 U.S. at 320, quoting Cantwell v.

Connecticut, 310 U.S. 296, 308 (1940).

In the present case, no breach of peace statute is involved. Rather, the Court is faced with a situation where a highly placed administrator launched a vehement and defamatory attack against the administration of which he was a part in a situation where he was acting in his official capacity. The remarks contained several words, phrases and accusations which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It is clear that the words of the speech were directed at the Highlands administration generally, and the Respondent Angel specifically. Further, at a minimum, certain segments of the audience were hostile in view of the take over of the president's office by militant students only a month before.

Because of the hostile audience, and Petitioner's position vis-a-vis the persons and entities he was attacking, Petitioner's words, under the circumstances were "likely to product violence in others." Consequently, Petitioner's remarks must be considered "fighting words," and not protected under the First Amendment.

4. This case is inappropriate for review because there are adequate non-constitutional bases for decision.

From its earliest pronouncements, the Supreme Court has adhered to the salutary rule of strict necessity in disposing of constitutional claims. This rule has found application on a jurisdictional

basis in the formulation of the courts refusal to render advisory opinions and in application of the related jurisdictional policy drawn from the case and controversy limitation. U.S.Const. Art. III; Muskrat v. U.S., 219 U.S. 346 (1911). As noted in Rescue Army v. Municipal Court of City of Los Angeles, 331 U.S. 541 (1947),the policy has not been limited to jurisdictional determinations. The Court has also developed another series of rules under which it avoids passing upon constitutional questions when not necessary to do so in the resolution of a particular case.

Applicable to the case at bar, is the rule that if a case can be decided on either of two grounds, one involving a constitutional question, and the other involving a question of general law, the court will decide only the latter. Siler v. Louisville and Nashville RR Co., 213 U.S. 175 (1909); Light v. U.S., 220 U.S. 523 (1911).

In Rescue Army v. Municipal Court of City of Los Angeles, supra, the Supreme Court made it clear that the rule of strict necessity is not merely procedural nor a rule of convenience. Rather, the court described the rule as one of substance grounded in the same ultimate foundations which sustained the jurisdictional case and controversy limitation. The rule of strict necessity was seen by the Court in Rescue Army, supra, as being a rule basic to the federal system and the Supreme Courts appropriate place within that structure. In line with the rule of strict necessity, this court should not issue a Writ in a case most easily resolved on non-constitutional grounds.

At the beginning of this Brief in Response to the Petition for Writ of Certiorari, Respondent provided the Court with as terse a summation as possible of the facts involved in this action. This explanation was necessary to demonstrate the many legal issues raised by the facts. If the Court to grants a Writ, Respondent is confident that upon exercising its independent review of the entire record as required in Old Dominion Branch #496 v. Austin, 418 U.S. 264 (1974), the Court shall be convinced that the proper resolution of the case is a holding either that the remarks made by the Petitioner Lux at the October 15, 1973 meeting were not a substantial or motivating factor in his non-renewal some 22 months later, or that the Respondent Angel has established his Mount Healthy defense. Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

In addition, the Respondent in the trial court and in the Court of Appeals of the State of New Mexico urged several grounds for reversal of the jury verdict based on the trial courts profound error in its instructions to the jury on Plaintiff's First Amendment claims. Respondent is comfortable in asserting that each of the non-constitutional grounds explained herein are proper, and represent the easiest and most appropriate means of resolving the real issues presented by this case.

The Supreme Court should not, and cannot, spend its valuable time reviewing cases which are most appropriately resolved on non-constitutional bases.

CONCLUSION

By any of the normal standards used by this Court in determining the propriety of discretionary review, this case does not present any issues requiring resolution, or perhaps capable of resolution, by this Court, and the Petition for Writ Certiorari should be denied.

Respectfully submitted,

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